No. 178.

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Clerk

Brf. of Thomas & Bryant for Pet.

IN

THE SUPREME COURT

Filed Dec. 7 1898.

OF THE

UNITED STATES.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO,
Petitioner,

vs.

E. H. ROLLINS & SONS,
Respondent.

No. 178.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF PETITIONER.

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I.

STATEMENT OF THE CASE.

This was an action brought in the Circuit Court of the United States for the District of Colorado, by E. H. Rollins & Sons, a corporation organized under the laws of the State of New Hampshire, against the Board of County Commissioners of the

county of Gunnison, a municipal corporation existing in the State of Colorado. The action was brought to recover the amount due on a large number of coupons cut from funding bonds of Gunnison County, issued on the first day of December, 1882, the complainant alleging that the county of Gunnison, on the first of December, 1882, having full authority thereto, issued its certain funding bonds in exchange for warrants of Gunnison County, which said warrants were exchanged at par, and the bonds issued to the warrant holder; that the bonds had been authorized by a vote of the qualified electors of the county and the conditions of the statute had been fully complied with; that the county of Gunnison paid the interest coupons upon said bond issue from the first day of December, 1882, until the first day of March, 1886, since which latter date it had refused to pay any interest; that the plaintiff was the holder and owner of coupons formerly attached and belonging to said bonds, and that the county had refused to pay the same.

The answer of the county contained, first, a general denial of all the allegations of the complaint, and then set out eleven affirmative defences, all arising under the provisions of the statutes and Constitution of the State of Colorado, and chiefly based upon the fact that the county in issuing the bonds set forth in the complaint had attempted to incur an indebtedness not authorized by the express provisions of the Constitution of Colorado. These various defences will be referred to more at length in the course of the following argument.

The complaint was filed on the first of March,

1895; the issues were made up and the case was tried on the 19th of May, 1896. At the conclusion of the testimony the judge of the Circuit Court directed a verdict for the defendant. The Court in directing a verdict rendered quite a lengthy opinion upon the various matters presented by the record, but concluded with a peremptory instruction to the jury to return a verdict for the defendant. The plaintiff took the case by writ of error to the United States Circuit Court of Appeals, where it was duly argued, and on May 3, 1897, an opinion was filed reversing the judgment of the Circuit Court and remanding the case for a new trial. A writ of *certiorari* was prayed for to this court, and granted.

There is little or no dispute upon the facts presented, nearly everything being a question of law, and the evidence bearing upon these various questions will be called to the attention of the Court at the proper places in the argument.

II.

Specification of Errors.

The only error which can properly be assigned upon the record, we presume, is the action of the Court of Appeals in reversing the judgment of the Circuit Court, but there are several propositions of law presented in the opinion of the Court to which we desire to call attention, and these propositions are the following:

First—The Court erred in reversing the judgment on errors committed in the admission or exclusion of testimony when the record shows that all the testimony was not contained in the bill of

exceptions and the court below directed a verdict for the defendant.

Second—The court below erred in holding that it was error in the trial court to admit in evidence the financial statements of Gunnison county for the six months ending respectively on December 31, 1881, June 30, 1882, and December 30, 1882.

Third—The Court erred in holding that the court below erred in admitting in evidence a certified copy of the record and proceedings of the Board of County Commissioners of Gunnison county by virtue of which the bonds in controversy had been issued.

Fourth—The Court erred in holding that the recitals contained in the bonds in controversy estopped the county from proving against an innocent purchaser that the bonds had been issued in excess of the limit of indebtedness authorized by the Constitution of Colorado.

Fifth—The Court erred in holding the bonds from which the coupons were cut to be valid obligations of Gunnison county.

We think that the various matters presented in the record can be reached by a discussion of the above propositions, and will take them up in the order indicated.

III.

Argument.

First—The Court erred in reversing the judgment on errors committed in the admission or exclusion of testimony when the record shows that all the testimony was not contained in the bill of exceptions and the Court below directed a verdict for the defendant.

The bill of exceptions, made a part of the records, does not show that it contains all of the evidence introduced upon the trial. This point was made in the Court of Appeals and sustained by the Court. Judge Thayer used this language :

"Inasmuch as the bill of exceptions fails to show that it contains all the evidence which was produced at the trial of the case, the point is well made, in behalf of the defendant, that the action of the lower court in directing a verdict for the defendant cannot be reviewed. Nor can any of the exceptions which were taken to the charge be reviewed, for, while the charge was somewhat lengthy, yet as it concluded with a peremptory direction to the jury to return a verdict for the defendant, it must be treated by this Court precisely as it would have been had the trial court, without any explanation of its views, simply directed a finding for the defendant. When a peremptory instruction is given either in favor of the plaintiff or the defendant, the only question with respect to the charge which is open for consideration by an appellate tribunal, is whether the direction to find for the one party or the other, when considered in the light of the pleadings and *all* the evidence, was right, and if the bill of exceptions fails to disclose that it contains all the evidence, *that* question, for obvious reasons, cannot be noticed. *Taylor-Craig Corporation vs. Hage, 32 U. S. App., 548; 16 C. C. A., 339; United States Mutual Accident Association vs. Robinson, 36 U. S. App., 690; 20 C. C. A., 262.*"

The Court then says that the only question which can be considered in the record is whether errors were committed in the admission or exclusion of testimony. This is a remarkable conclusion for a court to reach after saying that it could not review the action of the court in directing a verdict. In other words, the Court says: The judgment of the lower court is right; we cannot interfere with that judgment, but if, in arriving at a judgment of this kind, the court admitted in evidence erroneous

testimony or excluded proper testimony, we can reverse this righteous judgment upon that ground. This conclusion is one never before reached by a court of justice. The rule has been universal that wherever the judgment of a lower court is seen to be a right and proper judgment, a higher tribunal will not reverse it for any erroneous reason or because improper testimony may have crept into the record. Little or no argument need be made upon this head. This position is so obvious that merely calling it to the attention of the Court is sufficient. It is settled law that, where a court takes a case away from a jury and directs a verdict, that the same rules apply as though the court had tried the case alone without a jury.

Robbins vs. Potter, 98 Mass, 532.
Daly vs. Wise, 132 N. Y., 306.
Maier vs. Davis, 57 Wis., 212.

That is to say, the jury having been eliminated from the case by the action of the court, the appellate court will apply the same rules to the trial of the case that it would have applied had both issues of law and fact been submitted to the court in the first instance.

It is equally well settled that every presumption will be indulged to sustain the judgment of a trial court and although improper evidence may have been admitted it will be presumed that in arriving at a conclusion only proper evidence was considered and that the judgment of the court below is correct.

Hinckley vs. Pittsburg Steel Co., 121 U. S., 264.

Mammoth Mining Co. vs. Salt Lake Foundry & Machine Co., 151 U. S., 447.
Parker vs. Van Buren, 20 Colo., 217.
White vs. White, 82 Cala., 427.
Smith vs. Long 106 Ill., 485.
Tower vs. Fetz., 26 Neb., 706.
Kirkland vs. Telling, 49 Wis., 634.
Minton vs. Pickens, 24 S. C., 592.
State vs. Seabright, 15 W. Va., 590.

Second—The court below erred in holding that it was error in the trial court to admit in evidence the financial statements of Gunnison County for the six months ending respectively on December 31, 1881, June 30, 1882, and December 30, 1882.

The evidence in this case when it came on for trial on behalf of the plaintiff, consisted in offering in evidence one of the bonds of Gunnison County as a sample, over the objection of the defendants. The coupons sued upon in the case were cut from bonds numbered 9, 10, 11, 12, 13, 63, 64 65, 66 and 98. The plaintiff expressly disclaimed being the owner of the bonds themselves and only contended that they were the owners of the coupons. The only other proof offered by the plaintiffs was to show that Mr. Joseph Standley had exchanged warrants of Gunnison County for five of the bonds and had bought the other five for a valuable consideration; that he had afterwards sold the entire ten to the plaintiffs in this suit and that the plaintiffs had afterwards sold the bonds. They also proved that the coupons had never been paid and that the interest and principal amounted to $9,718.80.

The defendant upon the matter which we are

now calling to the attention of the Court first offered in evidence a certified copy of the abstract of the assessment or the amount of assessed property in the county of Gunnison for the years 1880, 1881 and 1882. An objection was made to these documents, but no exception was saved to their admission. These assesment rolls showed that the assessed valuation of Gunnison county for the year 1880 amounted to $596,583; for 1881, $1,266,962; for 1882, $2,340,955. Under the rules laid down by this Court in *Dixon Co. vs. Field, 111 U. S.; Lake Co. vs. Graham, 130 U. S.*, and *Hedges vs. Dixon Co., 150 U. S*, we have here the essential elements to determine the amount of indebtedness which the county of Gunnison could incur under the Constitution of Colorado. Section 6 of Article XI. of the Constitution of Colorado is as follows:

"No county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, towit: Counties in which the assessed valuations of taxable property shall exceed five millions of dollars, $1.50 on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, $3 on each thousand dollars thereof; and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall at a general election be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the

aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; provided that this section shall not apply to counties having a valuation of less than one million dollars"

The Court will see from the prohibitions contained in this provision that they do not apply to counties having a valuation of less than $1,000,000. Under the evidence referred to above, the assessed valuation of Gunnison county for the year 1880 was less than $1,000,000. It was, therefore, at liberty to contract an indebtedness to any amount. Under a recent decision of the Supreme Court of Colorado, the assessed valuation becomes effective for each year in the state on the first day of September.

Board of County Commissioners of Lake County vs. Standley, 24 Colo., 1.

Gunnison county, until the first day of September, 1881, was governed by the assessment roll for the year 1880, and its power to contract an indebtedness until said date was subject to no constitutional limitation. After the first day of September, 1881, and until the first day of September, 1882, it was governed by the assessment roll for the year 1881, and after the first of September, 1882, by the assessment roll of that year. The utmost limit of indebtedness authorized by the constitutional provision above was $12 per $1,000. The total indebtedness which Gunnison county could have under the assessment roll for the year 1881, and giving the widest possible latitude to the constitutional provision, would be $14,400, and for the year 1882, $27,600. This is allowing twelve dollars per thousand on $1,200,000 for the year 1881, and twelve dollars

per thousand for $2,300,000 for the year 1882. That is to say, up to the first day of September, 1882, Gunnison County could have a lawful indebtness of $14,400, and during the year 1882 it could incur an additional indebtedness of $13,200, bringing up its grand total to $27,600.

Under the rules announced in *Dixon Co. vs. Field*, the only factors to be considered by the Board of County Commissioners and the public in purchasing the bond issue would be the assessed valuation and the rate of indebtedness if the total amount of the bond issue appeared upon the face of the bonds. That is to say, if it appeared upon the face of the bonds from which the coupons were cut, that the total bond issue exceeded the sum of $27,600, a purchaser by looking at the assessed valuation and the constitutional limit would see that the total amount exceeded the total indebtedness which the county could incur. He would be put upon notice and no recitals by the county officials and no records made by them would estop the county from showing the invalidity of the bonds. One-half of the bonds in controversy come within this rule. Each of these bonds recited upon its face that the issue comprised three series, designated "A," "B" and "C," respectively; the bonds of series "A" being for the sum of $1,000; those of series "B" for the sum of $500; and those of series "C" for the sum of $100. The bonds in controversy were all designated as bonds of series "A." Those numbered 63, 64 65, 66 and 98, showed upon their face that bonds for $1,000 numbered from 1 to 62 had already been issued, so that a purchaser of these bonds would be put upon

notice that this bond issue at least amounted to $62,000, and was, therefore, prohibited by the consti utional provision above quoted.

We will not at this time discuss the effect of any valid indebtedness incurred in the year 1880, when the county had a full right to contract any indebtedness it saw fit. If such indebtedness exceeded the sum $14,000 or $27,000, it would still be a valid debt. Our position upon this point is that while the county had a right to incur any amount of indebtedness before the constitutional limitation took effect, yet this indebtedness would have to be counted as a part of the outstanding obligations of the county in going to make up the limit of indebtedness after the one million dollar mark had been reached. That is, if in this instance, the county had created a debt of, say, $30,000, it could not increase this indebtedness or incur any additional sum until it had reduced the amount below the limit laid down by the constitution. This point, however, is not directly involved in this case.

But the first five bonds mentioned in the complaint numbered from 9 to 13, would not, upon their face, show that they were issued in an amount prohibited by the constitution. They would show a bond issue of not to exceed $13,000, and the county could incur a total indebtednes of $14,400, at all times mentioned in the complaint and evidence. It was, therefore, necessary for the defendant county to introduce another factor in the case, and show that before these bonds were issued there was an outstanding previous indebtedness of a sufficient mount to make this additional $13,000, beyond the mit provided by the constitution. To do this the

defendant was compelled to prove that it had an outstanding indebtedness of a sufficient amount to produce this result. The defendant met this issue by offering in evidence three records showing the amount of indebtedness at the six months' periods ending December 31, 1881, June 30, 1882, and December 30, 1882. These were offered in evidence to bring the case within the terms of the decision of this court in *Sutliff vs. Lake County*, 147 U. S. The Circuit Court of Appeals held that this evidence was inadmissible.

Before giving the views of the Court upon this point it would be well to call attention to the statutory provisions which are discussed by the Court, and in its opinion..

Section 30 of the Act of March, 1877, is as follows:

"It shall be the duty of the Board of County Commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which time they shall have such statements published in some weekly newspaper published in the county, if there be such published, and if there be no newspaper published in the county, such commissioners shall cause such statements to be posted in three conspicuous places in said county—one of which shall be the Court-house door—and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts and to what individuals and on what account any money has been paid, and the amounts, and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the statement thus made, in addition to being published as before specified, shall also

be entered of record by the Clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times ''

Section 1 of the funding act of February 21, 1881:

"It shall be the duty of the County Commissioners of any county having a floating indebtedness exceeding $10,000, upon the petition of fifty of the electors of said county who shall have paid taxes upon property assessed to them in said county, in the preceding year, to publish for the period of thirty days in a newspaper published within said county, a notice requesting the holders of the warrants of such county to submit in writing to the Board of County Commissioners, within thirty days from the date of the first publication of such notice, a statement of the amount of the warrants of such county, which they will exchange at par and accrued interest for the bonds of such county, to be issued under the provisions of this act, taking such bonds at par.

"It shall be the duty of such Board of County Commissioners at the next general election occurring after the expiration of thirty days from the date of the first publication of the notice aforementioned, upon the petition of fifty of the electors of such county, who shall have paid taxes upon property assessed to them in said county, in the preceding year, to submit to the vote of the qualified electors of such county who shall have paid taxes on property assessed to them in said county in the preceding year, the question whether the Board of County Commissioners shall issue bonds of such county under the provisions of this act in exchange at par for the warrants of such county, issued prior to the date of the first publication of the aforesaid notice; or they may submit such question at a special election, which they are hereby empowered to call for that purpose at any time after the expiration of thirty days from the date of the first publication of the notice aforementioned, on the petition of fifty qualified electors as aforesaid; and they shall publish for the period of at least thirty days immediately preceding such general or special election, in some newspaper

published within such county, a notice that such question will be submitted to the duly qualified electors as aforesaid at such election."

"The County Treasurer of such county shall make out and cause to be delivered to the judges of election in each election precinct in the county, prior to the said election, a certified list of the taxpayers in such county who shall have paid taxes upon property assessed to them in such county in the preceding year; and no person shall vote upon the question of the funding of the county indebtedness, unless his name shall appear upon such list, nor unless he shall have paid all county taxes assessed against him in such county in the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the floating county indebtedness shall be for the funding of such indebtedness, the Board of County Commissioners may issue to any person or corporation holding any county warrant or warrants issued prior to the date of the first publication of the aforementioned notice, coupon bonds of such county, in exchange therefor, at par. No bonds shall be issued of less denomination than $100, and if issued for a greater amount, then for some multiple of that sum and the rate of interest shall not exceed eight per cent per annum The interest to be paid semi-annually at the office of the County Treasurer, or in the city of New York, at the option of the holder thereof. Such bonds to be payable at the pleasure of the county after ten years from the date of their issuance, but absolutely due and payable twenty years after date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the County Commissioners, and a certificate made of the same, and made a part of the record of the county; and any bond issued in excess of said sum shall be null and void, and all bonds issued under the provisions of this act shall be registered in the office of the State Auditor, to whom a fee of 10 cents shall be paid for recording each bond."

The Court of Appeals gives as the grounds of its ruling the following: "We are constrained to

hold the financial statements of semi-annual indebtedness are not admissible in evidence against an innocent purchaser for value before maturity of funding bonds containing such recitals as those contained in the bond in controversy, because the funding act of Febsuary 21, 1881, made it the duty of the Board of County Commissioners to determine the amount of county indebtedness and certify and record the same as one of the initial steps towards an issuance of funding bonds; that such a determination was made and entered of record before these bonds were issued, and is entitled to as much credit as the semi-annual statements of the same board under the general law of 1877." If it be true that the statute required the board *to determine and record the amount of the county indebtedness, it is equally true that the Board did not do so* in this case. It certifies to the amount of the *floating indebtedness only*, and that circumstance ought, of itself, to give some notice, even to a so-called *bona fide* holder, that a part only of the general indebtedness is floating. Neither is it true, as the Court declares, "that this certificate is required as an initial step toward the issuance of the bonds." The statute *does not provide when this determination shall be made*, although inferentially it may be said that such a certificate should be recorded prior to the issuance of any bonds whatever.

But the Court of Appeals, in endeavoring to distinguish the case at bar from the Sutliff case, declares that the bonds in suit are issued under a statute which makes "provision for a *judicial* determination of the amount of the county indebtedness before such bonds were issued, and also re-

quired such determination to be made as of the date of the proposed issue." If it be true that the act of 1881 invested the Board of Commissioners with the discretionary or judicial power of determining the amount of the debt of the county, then it must follow either that the statute in that particular is unconstitutional, or that the inhibitions of the constitution itself, together with the legislative act of 1877, concerning the government of counties, are not binding either upon the General Assembly or its creatures—the Board of County Commissioners. It must also follow that the decisions of this Court upon these subjects are meaningless and obsolete. *Dixon County vs. Field* has until now been justly regarded as a classic upon this subject. We shall not burden the Court with a repetition of the facts in that case, but will content ourselves by recalling the circumstance that the identical claim recognized by the Court of Appeals for the Board of Commissioners was there rejected. "Nothing in the way of inquiry, ascertainment or determination as to that fact," says the Court, "is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions and the performance of their duty; but the information is for themselves alone. All the world beside must have it from the same source and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic and proves itself by inspection, and concludes all determinations that contradict it."

Now, the County Commissioners could only determine the amount of the indebtedness

of the county in one way, and that way was by consulting the semi-annual statement immediately preceding August 21, 1882, and the record of warrants thereafter made and issued as provided by Section 44 of the General Act of 1877, requiring every county order to be numbered, and its date, amount and number and the name of the person to whom it is issued, to be entered in a book kept by him in his office for that purpose, and by a similar book of receipts and expenditures required by Section 105 of the same act to be kept by the County Treasurer, who, at the meeting in July and January of the Board of Commissioners, or such other time as they may direct, shall settle with them his account as Treasurer, and exhibit to them all his books and accounts and all vouchers relating to the same to be audited and allowed, both of which records are expressly declared to be public and subject to inspection. In other words, the amount of indebtedness, floating or otherwise, which the Commissioners were required by the refunding act of 1881 "to determine," was simply a matter of calculation and not of judgment. They exercised no more judicial power to determine the amount than is exercised by an adding machine which mechanically writes the correct quotient to any given number of figures. The principle of *Dixon County vs. Field* has been so often and so frequently recognized and approved by this Court that a mere statement of subsequent cases is unnecessary. We may be pardoned, however, for calling attention to the able summary of the doctrine of these cases announced by his Honor, Judge

Sanborn, in the case of *The National Life Ins. Co. vs. The Board of Education*, 62 Fed. Rep., 791.

"From the decisions to which we have referred," says the learned judge, "we think the following rules are fairly deducible: Recitals in municipal bonds by the representative body that issues them, to the effect that all the requirements of law with reference to their issue have been complied with, will not estop the municipality from proving, as against a *bona fide* purchaser, that the representative body had no power to issue them, where no act of the representative or the constituent body could make the issue lawful at the time it was made, and this fact appears from the Constitution and statute under which the bonds are issued, the public records referred to therein and the bonds the purchaser buys. *Dixon County vs. Field, supra*, and cases cited thereunder. Such a recital may constitute an estoppel in favor of a *bona fide* purchaser even where the body that issued the bonds had no power to issue them, but could not, by any act of its own or of its constituent body, make a lawful issue of bonds, if that fact does not appear from the bonds the purchaser buys, the constitution and the statutes under which they are issued and the public records referred to therein.

Chaffee County vs. Potter, and cases cited *supra*.

If it be true that the act of 1881 must be considered as wholly independent of the general act of 1877, and that it lawfully conferred upon the Board of County Commissioners of Gunnison county *power to judicially determine the amount of*

the county indebtedness, and that the exercise of such power is conclusive upon the county as to bonds issued under said act in the hands of a *bona fide* holder, *then it must follow that there is no limitation upon the exercise of that power*, so far as the consequent liability of the county may be concerned. For example, the commissioners in this instance are said to have "judicially determined" the indebtedness of the county on August 21, 1882, to have been $174,000. Could they not as well have "judicially determined" that indebtedness to have been $174,000,000? And would not the issuance of bonds to that amount have consequently been valid obligations against the county in the hands of *bona fide* holders? In what manner shall we escape the conclusion that every county in the state by that law, previous laws and the constitution to the contrary notwithstanding, became subject to whatever indebtedness the Board of Commissioners might "judicially determine" to exist at a given time. A bitter experience warns us that since the issuance of funding bonds has become a recognized pursuit, the conscience of issuing Boards has, in many instances, scarcely been a visible quantity.

But the honorable Court of Appeals emphasizes the fact that as the Board is required to determine the true amount of the county debt as of the date of the first publication, "and as such indebtedness is liable to great fluctuations between the dates of the several semi-annual statements, it is fair to presume that the statement of the total county indebtedness, for which provision is made in the funding act, is the only authentic statement

of such indebtedness which the Legislature intended should be consulted either by warrant holders or other persons who might be concerned in the issuance of funding bonds." If this circumstance is controlling in the case of funding bonds, it should be equally controlling in the case of bonds like those in controversy in Sutliff against the commissioners. They, too, may be issued between the dates of semi-annual statements, at which time the fluctuations may exist, and the record of such statements, therefore, be not controlling; but we have already pointed out that other records, provided for by the same act and binding alike upon the County Commissioners and the public as matters of general record, subject to constant inspection, are provided for, so that the amount of indebtedness at any given time is merely a matter of calculation and not of judgment. If this circumstance is controlling in the case at bar, the doctrine of Sutliff againt the Commissioners cannot be sound law, and we come at once to a comparison of the doctrine of that case with the opinion now under consideration.

The honorable Court of Appeals have labored earnestly, but unsuccessfully, to show that Sutliff against the Commissioners is not applicable to this controversy. In the first place, it contends that the bonds there in suit were issued under Section 21 of the same act, of which Section 30 provides for semi-annual statements, and, therefore, a difference between the two cases exists. The statement is true, but the result cannot follow. The First General Assembly of the State of Colorado in 1877 among other things enacted a gen-

eral law concerning county government, which was intended to cover all phases of county administration, including the issue of bonds for loan, under Section 6, Article XI., of the Constitution, for the erection of public buildings and the building and repairing of roads and bridges. Section 30 provides for a permanent continuing public record of the indebtedness of all counties on January 1st and July 1st of each year, wholly irrespective of the issuance or non-issuance of bonds, either under special or general laws. The records thus kept by all the counties are open to public inspection at all times, and necessarily binding upon persons dealing or having occasion to deal with the County Commissioners. *These statements constitute the source from which must be ascertained all things necessary to set in motion the funding act of 1881.* It is intended by them to show correctly and conclusively all forms of indebtedness and all sources of revenue. It provides, so to speak, for a semi-annual trial balance of the county affairs, and, in the language of Mr. Justice Harlan in the Field case, concludes all determinations contrary to itself. It is binding alike upon warrant holders, contractors, the holders of bonds for the floating of loans, for funding purposes, and for all other purposes. To say that the provisions of such an act are binding upon *bona fide* holders of bonds issued for courthouse and similar purposes, but are not binding on the holders of funding bonds representing warrants necessarily included in such statements before they could be funded, is practically to hold that a general statute intended for general purposes and binding upon the public in general is conclusive

only upon a very small proportion of such public, all the others being relegated to the relieving clauses of special acts which not only did not but never before were supposed to have even indirectly repealed or affected such general law.

The honorable Court, continuing, say:

"We do not understand the decision in the Sutliff case to go to the extent of holding that a bond purchaser must, at his peril, examine every record of county indebtedness which has been made by county officials, pursuant to the provisions of the statute, with a view of satisfying himself that the constitutional limit of indebtedness has not been exceeded."

This may be true, but the Court of Appeals must certainly have understood the Sutliff case to go to the extent of holding that bond purchasers must at their peril examine the record of these semi-annual statements, and it is precisely these statements which the Court of Appeals declare not to be binding upon the holders of funding bonds.

The language of Mr. Justice Gray upon this subject is as follows:

"In those cases in which this Court has held a municipal corporation to be estopped by recitals in its bonds, to assert that they were issued in excess of the limit imposed by the Constitution or statutes of the State, the statutes, as construed by the Court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. *But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of everyone, there can be no implication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded by the officers charged with the duty of issuing the bonds.*"

Sutliff vs. Commissioners, 147 U. S., 235.

Again:

"The case at bar does not fall within *Chaffee County vs. Potter, and cannot be distinguished in principle from Dixon County vs. Field, or from Lake County vs. Graham.* The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas, here two facts are to be shown—the valuation of the property and the amount of the county debt; but as both of those facts are equally required by the statute to be entered on the public record of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds." *Ibid.*, page 238.

In *Lake County vs. Graham*, funding bonds were in controversy, yet this honorable Court not only failed to note the fine distinction between funding bonds and building bonds, but expressly declare that no such distinction exists.

If this does not mean that the public record required to be kept by Section 30 is binding upon all the world, including the *bona fide* holders, so called, of funding bonds, then it is difficult to comprehend the meaning of language or the intention of courts as expressed therein. The two cases cannot stand together. The rule applicable to the liability of counties in one case is absolutely irreconcilable with the other. Both cannot be right. One must be wrong.

This inexorable fact must have impressed itself upon the mind of the honorable Court of Appeals, for it proceeds as follows:

"Even if such is the rule where, in cases like the Sutliff case, the bonds do not contain an express recital that the issue does not exceed the constitutional limit, yet it ought not to be applied to a case like the one in hand, where the bonds do con-

tain a certificate 'that the total amount of this issue does not exceed the limit prescribed by the Constitution of the State of Colorado.' ''

Here, then, is the only distinction which the Court of Appeals makes with confidence. The recitals in the two sets of bonds are different, and the recital contained in the funding bonds of Gunnison County is so broad as to wipe out the doctrine of the Sutliff case and make the county liable, irrespective of past decisions to the contrary.

We assert that this recital appearing on the face of the Gunnison County bonds is not only not warranted by anything in the funding act of 1881, but was made absolutely without any authority by the Commissioners, was the attempted exercise of a judicial power and would have been utterly void if the statute of 1881 had expressly attempted to confer such power upon them. A moment's consideration should be sufficient to convince one of the truth of these assertions.

The bonds in suit were drafted with great cunning and adroitness. A statement of the total amount of their issue was carefully avoided. They would not even have been numbered if the requirement of the statute could have been eluded. Nothing beyond the number which could have informed the holder of a bond of the total amount of the issue was permitted to appear upon them. It was, however, recited, without giving the amount of the issue, "that the total amount thereof does not exceed the limit prescribed by the Constitution of the State of Colorado." If such a recital was within the province of the Board to make, it is easy to perceive that Section 6 of Article XI. of the Con-

stitution would be utterly worthless as a barrier to municipal indebtedness. Given an indefinite issue of bonds, which makes no recital of the total amount of the issue, but declares that the constitutional limit has not been exceeded, and that limit, whatever it may be, disappears in an instant. It is true that the funding act requires the bonds to be registered with the Auditor, and the Commissioners to declare and record the amount of the county indebtedness, but the Court of Appeals holds that this amount may be fixed by the Commissioners in their discretion. It also decides that no statement of such amount is intended to fix the time when the indebtedness accrued, and it will, therefore, be presumed to have accrued at a time when the Commissioners had power to create it. This, coupled with the declaration in the bond itself that the limit had not been exceeded, places all the property of the taxpayers of the State of Colorado entirely at the mercy of a compact between bond-brokers and dishonest Commissioners. This virtually decides that *bona fide* holders are only charged with notice of a certificate and record which tells them nothing and which is, therefore, wholly worthless, either as knowledge to them or as a protection to taxpayers.

Again, if Commissioners may issue funding bonds reciting that the constitutional limit has not been reached, there is but little protection in that provision of Section 1 of the funding act which declares that any bond issue in excess of the sum of the indebtedness determined by the Commissioners shall be null and void; for, bearing in mind that the bonds are silent as to the total amount of the issue—that a purchaser could not, with one or

more bonds in his hand, determine from the record of the County Commissioners anything about the nature of the indebtedness, and that the recital as to the constitutional limit affords him ample protection—the Gunnison bond issue would be enforceable as well for $500,000 or any other sum as for $174,000.

It will not, of course, be overlooked that a Board of County Commissioners can exercise only such authority as may be expressly or by necessary implication conferred upon it. We search in vain for any express authority to the Commissioners to determine and recite the fact that the constitutional limit of indebtedness has not been reached. If it can do this, it may also insert in the bonds a recital that such a fact has been judicially determined by a court of competent jurisdiction, whether the same be true or false; that the said bonds shall be good in the hands of all holders, whether *bona fide* or otherwise; that the county has waived and relinquished the right to contest the validity of said bonds by judicial proceedings or otherwise, or that no defects which might injure or vitiate the bonds would be pleaded against them by succeeding county officials.

It is true that a similar recital on the face of the bonds in the suit of Chaffee County against Potter was held (Mr. Justice Gray dissenting), under the peculiar circumstances of that case, to estop the county from showing the contrary. Neither the question of the power or authority of the Commissioners to insert such a recital, nor the fact that a statute of the state required a public record of semi-annual statements of the indebted-

ness of the county to be kept, were brought to the attention of the Court. It held, therefore, that a purchaser could not, the bonds being silent as to their total amount, take one of them, or the whole issue, for that matter, and *by comparing it with the record of assessments*, ascertain whether the limitation had been reached.

We will compare the doctrine of that case with the one at bar later on.

Surely this Court cannot sustain the contention that the decision in the Sutliff case has no application to the bonds in suit because of an unauthorized recital upon the face of the latter, which in no wise absolves their holders from the effect of the records provided by section 30, except upon the theory that the Board of County Commissioners of Gunnison County constituted a judicial body, and, as such, had power to reach and announce conclusions at variance with the public records of the county.

Another reason assigned by the Court of Appeals for the inapplicability of the Sutliff case to this one is that "where two acts are passed at different times, each making provision for an official statement of the county indebtedness, to be made at different times, one of which is required to be made with express reference to an issue of bonds, and is one of the preliminary steps to that end, it is reasonable to conclude that the purchaser of the bonds is at most only charged with the duty of examining the latter statement." *"If a discrepancy exists between them*, it is clear," says the Court of Appeals, "that the statement should govern which was made with express reference to an issue of bonds, and presumably for the information of the

bondholders." The fatal weakness of this position lies in its assumption that the statements required to be made by the two acts of 1877 and 1881 are in conflict with each other, and that a discrepancy must exist between them. As a matter of fact, there can be no conflict between the semi-annual statements and the finding by the Commissioners of the amount of county indebtedness as preliminary to the issuance of funding bonds. The last must of necessity be derived from the first, and, unless so derived, can have no lawful foundation. The Commissioners cannot arbitrarily determine whether the county owes one dollar or ten dollars; they must go to the records, and from them make their calculation. No discrepancy whatever exists or is claimed to have ever existed between the amount certified in this case by the Commissioners as of August 21, 1882, and the record of semi-annual statements. Indeed, when the one is compared with the others, it will be found that the debt of the county on August 21, 1882, must have been just about the sum certified by the Commissioners, assuming, of course, that outstanding warrants represented an actual indebtedness. If we, therefore, should concede, for the sake of the argument—which we do not—that the position of the Court of Appeals on this point was sound, its conclusion must disappear upon the discovery that the discrepancy between the statements is wholly imaginary.

But the Court of Appeals, after disposing of the semi-annual statements, declares it to be unnecessary to determine whether the record of the Commissioners under the funding act was or was

not binding upon the plaintiff in error, for the reason that it is immaterial. The honorable Court says that "This record disclosed no facts rendering the bonds void in the hands of an innocent purchaser for value, because, although the certificate showed the total county indebtedness as of April 21, 1882, it did not pretend to state when that indebtedness was created. Moreover, the bonds on their face purported to be funding bonds, issued for valid floating indebtedness which would not create a new debt, assuming the warrants for which they were issued to have been valid, but would simply change the form of existing indebtedness. A purchaser of the bonds, therefore, who examined one of them, or the whole issue, for that matter, in the light of the constitutional provision, and the certificate made by the Board, would have been unable to say that the aforesaid recital was false, and that the bonds were void, for the reason that the entire debt certified to by the Board might have been created before the assessed value of the county property reached the million-dollar mark, until which time there were no restrictions upon the power of the county to contract debts."

If it be true that the holder of one of the bonds or the entire issue could not, by consulting the County Commissioners' record of August 21, 1882, determine that the bonds were void because such certificate was silent as to the time when the dept was created, no better reason can be advanced in support of our contention that the semi-annual statements provided by Sections 30 of the act of 1877 are binding upon all assumed *bona fide* holders; for a reference to those statements must

inevitably have shown that a large proportion of the total indebtedness of $174,000 was absolutely void, because incurred at a time when the constitutional limitation was in full force, and inasmuch as no particular warrant was exchanged for any particular bond, the good could not be separated from the bad, and all would be void, under the decision of this Court in *Hedges vs. Dixon County*, 160 U. S.

For example, if a holder of the bonds or any of them had gone to the record of semi-annual statements, he would have found the debt of the county to have increased over $51,000 between the 31st of December, 1881, and the 30th of June, 1882, and more than $150 000 between the last named date and December 30, 1882, which period would include the amount of increase between June 30 and August 21, 1882.

Turning, then, to the record of assessed valuations, he would have discovered, and must, therefore, be charged with notice of the fact that on September 1, 1881, the million dollar limit of valuation was reached and passed, and that one year thereafter the valuation was less than two and one-half millions in all. These facts, binding alike upon seller and purchaser, and constituting public records accessible to all, cause the logic of the Court of Appeals to disappear, and bring the decision face to face with those of this honorable Court.

Just here we desire to emphasize the fact that *the Court of Appeals, from the beginning to the end of its opinion, seems either to have ignored or lost sight of the importance of the records of assessed valuation of the county* and forming part of the record. The effect of these assessments upon holders and

would-be purchasers of the bonds of Gunnison county is not so much as alluded to; the Court seems to have gone upon the theory that the record of indebtedness *and that alone* must be considered in connection with the rights of *bona fide* holders of these bonds. The effect of the two records, the assessments on the one hand, and the indebtedness on the other, so graphically described by Mr. Justice Gray in the Sutliff case, is not even mentioned. When we consider that the record of the county valuation is as indispensable as the other, and that the two must be considered together, and in connection with the bonds, the error of the Court's conclusions becomes the more apparent.

But the Court of Appeals, in support of its contention, cites *Chaffee County vs. Potter*, 142 U. S., 355. The bonds forming the subject of that controversy were evidently prepared by the same cunning hand which wrote those of Gunnison County. They recited that the total amount of the issue did not exceed the limit prescribed by the Constitution of the State. They were silent as to the total amount of the issue. The defenses pleaded by Chaffee County to that suit were simply that the bonds had not been authorized by qualified voters to be exchanged for warrants of the county, and the Board, therefore, had no jurisdiction to issue them; that they were issued in violation of Section 6, Article XI., of the Constitution of the State, and the debt which they assumed to fund was contracted in violation of said provision, and the bonds were issued without any consideration valid in law, as plaintiff well knew when he received the coupons sued on. To these defenses

a general demurrer was interposed, and the demurrer being sustained, judgment was entered thereon. There was nothing in the record which disclosed what the amount of the assessed valuation of the county was, on the one hand, or that a record of semi-annual statements of indebtedness had been kept on the other. There was no claim that the debt had been created either prior or subsequent to the time when the valuation of the county exceeded $1,000,000, or that the County Commissioners had made any record or certificate of indebtedness under the funding act itself. The power of the Commissioners to insert such a recital was not challenged. Indeed, counsel for the county seem to have assumed that the decision of this Court in Lake County against Graham had settled all questions connected with municipal securities in Colorado, and nothing further was necessary to be done or considered. Indeed, the only statute brought to the Court's attention was the State funding act. Mr. Justice Lamar decided that case from the record, and from that alone. He said the purchaser might even know—indeed, it may be admitted that he would be required to know—the assessed valuation of the taxable property of the county, and yet he could not ascertain, by reference to one of the bonds and the assessment roll, whether the county had exceeded its power under the Constitution in the premises. What he would have said, speaking for this honorable Court, had Section 30 of the act of 1877 been properly pleaded, so that the indebtedness, as well as the valuation, would have been taken into account, was doubtless stated by Mr. Justice Gray in

the Sutliff case, for on page 237 of that decision we find this reference to the Potter case:

"In Chaffee County against Potter, the bonds contain an express recital that the total amount of the issue did not exceed the constitutional limit and did not show on their face the amount of the issue, *and the county records showed only the valuation of the property*."

The italics are ours.

If, in addition to the record of the valuation, the other fact, to wit, the amount of the county debt, had been shown, "both equally required by the statute to be entered on the public records, of which all the world is bound to take notice," the decision would have been in perfect harmony with our contention, it differs from the Sutliff case only because our record was pleaded in the one and both of them were prominent in the other. If, too, the Court of Appeals had paused for one brief moment to consider the fact that the record of assessed valuations was in this transcript, its reliance upon Chaffee County against Potter would have been less confident, and, upon a little reflection, would have entirely failed.

There is one other reason why the Court of Appeals was wrong in holding these semi-annual statements to be non-admissible, and that is that they were never objected to by the plaintiff upon the ground discussed by the Court of Appeals. Page 47 of the Record will show just exactly what occurred when these semi-annual statements were offered in evidence. We quote the proceedings in full:

"MR. THOMAS: We now wish to offer a certified copy of the financial statement of the condi ion of Gunnison county for the

six months ending December 31, 1881, showing the total indebtedness of the county of Gunnison at that time.

"MR. JOHNSON: We object to the semi-annual statement of December 31, 1881, upon the following grounds: First, the bonds having been issued on the first day of December, 1882, the semi-annual statement of June 30, 1882, would be the material statement, if any one would be, and this one is not material.

"*Second*—That it has not been shown that this semi-annual statement was published in a newspaper or by posting, as the law requires, and that the recording thereof is only authorized in regard to a semi-annual statement that has thus been published.

"*Third*—That the statement on its face is not in compliance with the statute, and is not sufficient to bring home to the purchaser of bonds any actual knowledge of the indebtedness that is outstanding, and, particularly, any knowledge of the validity or invalidity of such indebtedness.

"*Fourth*—Because the semi-annual statements provided by a certain statute is not required to be kept, either by the Constitution or by the statute under which these bonds were issued, and, therefore, the purchaser cannot be required to take any notice of the same.

"*Fifth*—Because the funding act under which these bonds were issued vested in the Board of County Commissioners the power to compute the amount of the valid outstanding indebtedness of the county and to make a certificate in reference thereto, and these bonds having recited on their face that they were issued to fund valid floating indebtedness, a purchaser would not be bound to investigate this record.

"*Sixth*—Because this semi-annual statement offered in evidence does not attempt to show when the indebtedness mentioned therein was contracted, or whether it was contracted prior to the adoption of the Constitution or after such adoption, or whether it was contracted prior to the time the assessed valuation of the county reached a million dollars, or after that time, and that for these various reasons a purchaser would actually receive no notice or knowledge from the face of this semi-annual statement as to whether this indebtedness that was being funded by the issuance of these bonds was valid or invalid.

"*Seventh*—Because said indebtedness has been validated by constitutional amendment.

"THE COURT: We will receive the statement; some of these matters will be considered further on.

"To which ruling of the Court counsel for complainants then and there duly excepted.

"Whereupon said statement was received in evidence and was marked Exhibit G, and is hereto attached and made a part of this record.

"MR. THOMAS: We will offer a similar certified copy of the financial statement of Gunnison county for the six months ending June 30, 1882.

"MR. JOHNSON: We desire to object to the introduction of this record for all the reasons stated heretofore that are applicable.

"Which objection was by the Court overruled, to which ruling of the Court counsel for complainants then and there duly excepted.

"Whereupon said statement was received in evidence and marked Exhibit H, and is hereto attached and made a part of this record.

"MR. THOMAS: We also desire to offer a similar certified copy of the statement of the condition of Gunnison county for the six months ending December 30, 1882, for one month beyond the time when the bonds were issued, five months previous.

"Objected to by counsel for complainants for all the reasons heretofore stated, and for the additional reason that it was made after the issuance of these bonds.

"Which objection was by the Court overruled, to which ruling of the Court counsel for complainants then and there duly excepted. Said statement is hereto attached marked Exhibit I."

The main ground upon which the Court held these semi-annual statements inadmissible was that the recitals in the bonds precluded the county from making any proof as to the amount of the county indebtedness. Not one of the seven objections made to the statements when offered in evidence was directed to this specific ground.

The other ground of objection which seems to have been considered by the Court of Appeals, was that the semi-annual statements did not show when

the indebtedness mentioned had been contracted, so that it was impossible to tell whether before or after the assessed valuation of the county had reached one million dollars. But an examination of the statements themselves, which will be found in the Record beginning at page 108, and extending to page 121, will show this ground of objection as a matter of fact to be not well taken. The first statement which was for the six months ending December 31, 1881, shows that on June 30, 1881, there was a bonded indebtedness of $20,000, and outstanding warrants amounting to $29,690.44; that there was issued during the six months, beginning June 30, 1881, $34,227.86 of warrants, while there was canceled only $6,359.29, leaving a total warrant indebtedness of $57,559.01 outstanding December 31, 1881. Then follows a detailed statement showing the exact purpose for which the warrants had been issued. So that we have about $35,000 of the indebtedness contained in the first statement contracted after the county had already passed the limit of indebtedness that was imposed on September 1, 1881.

Turning to the next statement, found on page 116 of the Record, we find that from January 1 to June 30, 1882, $45,689.99 of warrants were issued, while only $8,200 were canceled; so that we have here incurred a new debt of many thousands of dollars beyond the total indebtedness allowed to the county.

Turning to the third statement, on page 118, we have warrants issued during that six months amounting to $80,939.27 and only $1,567.36 canceled; or an indebtedness created during that six months of several times the total amount which the county could possibly incur. The sixth ground of objection taken by counsel was not true as a matter of fact.

The first three grounds of objection made by counsel relate to mere matters of detail that are not even referred to by the Court of Appeals.

The fourth ground of objection is unintelligible, but seems to be made to the point that the semi-annual statements were not required to be kept by the statute under which the bonds were issued.

The fifth ground of objection is equally unintelligible, but seems to make the objection that the funding act having given the county commissioners authority to canvas the valid indebtedness of the county, the conclusion reached by the commissioners would be the only record which the purchaser would be required to notice, and he would not be compelled to investigate the record of semi-annual statements. These two objections are hinted at by the Court of Appeals, but its opinion does not seem to be expressly grounded upon either but solely upon the ground that the bond, having recited that the issue did not exceed the constitutional limit, the purchaser would be protected by this statement, and would be bound to take no notice of what was found in the semi-annual statements.

The seventh and last ground of objection was that the bonds had been validated by constitutional amendment. No reference is made to this in the opinion of the Court.

Under the well-settled rule that a person objecting to evidence must point out the specific ground of his objection, we contend that none of these objections were well taken, and the Court of Appeals so acknowledges it by its failing to place its decision upon either. For these reasons we contend that the Court was clearly wrong in holding that these semi-annual statements were not admissible in evidence.

Third—The Court erred in holding that the Court below erred in admitting in evidence a certified copy of the record and proceedings of the Board of County Commissioners of Gunnison county, by virtue of which the bonds in controversy had been issued.

The defendant offered in evidence a certified copy of the official proceedings of the Board of County Commissioners under which the bonds were issued. This was objected to by the plaintiff upon the ground that under the funding act a purchaser of bonds with recitals such as are contained in the bonds in controversy, would not be required to take any notice of the procedure of the board leading up to the actual issue and execution of the bonds.

The Court below after enquiring whether these proceedings contained the statement which counsel for the plaintiff had insisted was the only one to which a purchaser was bound to look, admitted the record in evidence (Transcript of the Record, page 48).

The portion of the record which was material consisted of a certificate made by the Board of County Commissioners, to the effect that the sum of the floating indebtedness of said Gunnison county amounted to $174,115.29. This certificate will be found in the transcript of the Record at page 132. The certificate was that the sum of the floating indebtedness of the county amounted to said amount on the date of the first publication of the notice to warrant holders ; that is to say on the 21st day of August, 1882 The Court will note that the assessed valuation for the year 1881 became effective on the first day of September, 1882 ; so that we have a floating indebtedness of $174,000, under an assessed valuation which permitted a total

indebtedness of $14,400. But the Court of Appeals say that it was not necessary to pass upon the question of whether or not a purchaser of the bonds would have to take notice of this record and the amount of the indebtedness therein stated, for the reason that the record of indebtedness disclosed no facts rendering the bonds void in the hands of an innocent purchaser for value. This upon the ground that the statement did not pretend to set forth when the indebte lness was created. Also upon the ground that being funding bonds they did not create a new debt but simply changed the form of an existing indebtedness. Upon this ground any invalid debt might be placed in the shape of a funding bond and made valid—another subterfuge by which county authorities could escape the positive prohibitions of the constitution. The Court says that the entire $174,159 might have been incurred before the million dollar mark was reached. This is true, and it might also have all been incurred after the million dollar mark had been reached. There is no presumption that we can see to be indulged in either way. A purchaser of these bonds on the 1st of December, 1882, or afterwards, was bound to take notice of the fact that he was purchasing obligations of a county which was acting under the provisions of a constitution that prohibited the county from incurring an indebtedness beyond a certain amount. He was bound to take notice of the fact that the assessed valuation of the county at that time amounted to more than two million dollars, and that by the express provisions of that instrument the constitutional prohibitions applied to that county. Was it not his duty to examine all the public records of the county bearing upon the county debt and ascertain whether or not the in-

debtedness which he was about to purchase was good or bad? Was he not bound to note that the Board of County Commissioners who issued these identical bonds had certified that on the 21st day of August when the county could only incur a debt of $14,400, that it was indebted in the sum of $174,000? Was not this a record sufficient to put him upon inquiry to the same extent and entitled to the same weight as the recital set forth in the bond? We cannot comprehend upon what theory the Court is able to say that a purchaser was not bound to take notice of this public record just as much as the purchaser of bonds in the Sutliff case was bound to take notice of the semi-annual statements required by the statutes of Colorado. Indeed, our contention is that the purchaser of bonds, or any other form of county indebtedness, is bound to take notice of every county record open to public inspection which contains a statement of the county indebtedness, whether it be a warrant register setting forth the warrants that are issued from day to day, a bond register setting forth the amount of bonds issued from time to time, the semi-annual statements of indebtedness (which are nothing but trial balances struck twice a year) a certificate required to be made before the bonds are issued, or any other public record of any kind, nature or description that is open to the inspection of everyone. We have discussed this phase of the case in the brief filed in the case of The Board of County Commissioners of the County of Lake, and State of Colorado, against Harry H. Dudley, at page 39 *et seq.* of said brief, to which reference is hereby made.

Fourth—The Court erred in holding that the recitals contained in the bonds estopped the county from

proving against an innocent purchaser that the bonds had been issued in excess of the limit of indebtedness authorized by the Constitution of Colorado.

This subject has been touched upon to a large extent in the argument of our first proposition, but we wish to call special attention to this point. The particular recital is contained in the following words: "It is further certified that the total amount of this issue does not exceed the limit prescribed by the Constitution of the state of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said county of Gunnison voting on the question at a general election, duly held in said county, on the 7th day of November, A. D. 1882."

The Court will note that this recital is contained in the bond itself. The allegation of the complaint is that the plaintiff is the owner of coupons cut from said bonds. There is no allegation as to when he purchased the coupons, or whether the coupons were detached from the bonds at the time they were purchased or not. We do not understand that a purchaser of coupons cut from the bonds which he never saw would be protected by any recital in the bond itself. The doctrine of estoppel has always been strictly construed, and we believe will still be strictly construed if it can have any effect whatever as against a constitutional provision. The coupons which the plaintiff owns and which it purchased at some time are simply straight promissory notes of the County of Gunnison. The coupons in controversy were due from the 1st of March, 1887, to the 1st of September, 1892. Under the testimony of Mr. Standley the bonds were sold to plaintiff on the 16th of June, 1892. Whether attached or unattached the coupons were from six months to six years overdue.

But aside from this the language of the recital is not very explicit and ought not to operate as an estoppel, even though any estoppel could be urged against a want of power. The certificate is simply that the total amount of this issue does not exceed the limit prescribed by the Constitution of the State of Colorado. It does not say what is meant by the word "limit." If this refers to the limit of indebtedness it simply says that this bond issue, of itself, does not exceed such limit. The total amount of this issue does not mean that there was not outstanding other indebtedness which, added to this issue, would exceed the constitutional limit. Not a word is said with reference to other bond issues, other indebtedness, or anything beyond the mere amount of this particular issue. Giving this language the strict construction which all estoppels must be given, it would not prevent the county from showing other indebtedness outstanding before these bonds were issued.

But aside from all this, we desire to submit to the Court whether or not, under all the decisions of this tribunal, a recital of this kind can estop the county from showing by other public records that the bond issue did exceed the constitutional limit. Under the decisions already called to the attention of the Court, a constitutional provision like that contained in the constitution of Colorado operated as a denial of a power to create indebtedness to the county. A county organized under that constitution had no power of any kind to create a debt beyond the limit prescribed. The language of this Court in construing this identical constitution is explicit upon this point. The Court says: "The question here is distinguishable from that in the cases relied on by counsel for defendant in error. In this case the standard of validity is created by the con-

stitution. In that standard, two factors are to be considered: One the amount of assessed value, and the other the ratio between that assessed value and the debt proposed. These being exactions of the constitution itself, it is not within the power of a legislature to dispense with them, either directly or indirectly, by the creation of a municipal commission whose finding shall be taken in lieu of the fact."

Lake County vs. Graham, 130 U. S., 674.

That was a case upon funding bonds. The two factors to be considered in that case are the ones to be considered in this case—the amount of assessed value and the ratio between the assessed value and the debt proposed. The assessed value here was $1,200,000. The debt proposed was $174,000. The debt authorized by the assessed valuation was $14,400. Could any municipal commission, could the legislature itself, could all the people of the county, make a recital that would prevent the county from showing the relations between these two factors and showing the exact condition of affairs? The case is squarely in line with the decision of this Court just quoted and this decision has never been questioned from the good day it was rendered to the present time. The principle was reaffirmed in the case of *Graves vs. Saline County*, 161 *U. S.* 350, in the following language:

"While it is true that the mere exchange of new bonds for old ones and the payment of interest on the former by the county authorities would not estop the county from challenging the validity of the new as well as that of the old bonds, yet we think it was competent for the county, in such a state of facts as here existed, by a vote of its people, to waive the condition attached to the original subscription and to estop itself from declining to be bound by the new negotiable securities. It must be admitted,

as well-settled law, that where there is a total want of power to subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defense by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds."

Chaffee County vs. Potter, 142 U. S., 355, is the only case which can be cited against this position, and that case, when fairly construed, does not militate at all against us now. It does not appear from the record in that case as to whether the certificate made by the County Commissioners and spread upon the records of the county showed an amount of indebtedness in excess of that allowed by the constitution. Mr. Justice Lamar stated that the statute in terms gave to the Commissioners the determination of a fact and required them to spread a certificate of that determination upon the records of the county. The Graham case held that the Legislature had no right to delegate a power of this kind to any municipal body. In this respect the two cases are in direct conflict, and we believe that this Court will decide this conflict in favor of the Graham case, in view of the later cases of *Sutliff vs. Lake County*; *Hedges vs. Dixon County* and *Graves vs. Saline County*.

But even in the Potter case the Court seems to concede that the purchaser must look to the certificate required to be made out by the county commissioners. A purchaser of the Gunnison county bonds, if he had done this, would have ascertained that there was a flat contradiction between the certificate and the recital in the bond. The certificate showed that there was an indebtedness of $174,000. The recital was that the amount of indebtedness did not exceed $14,400.

The concluding sentence in *Sutliff vs. Lake*

County should control this case. Mr. Justice Gray says:

"The case at bar does not fall within *Chaffee County vs. Potter*, and cannot be distinguished in principle from *Dixon County vs. Field* or from *Lake County vs. Graham*. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be shown, the valuation of the property and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds."

Sutliff vs. Lake County, 147 U.S., 230.

The two facts mentioned in this language of Mr. Justice Gray, namely, the valuation of the property and the amount of the county debt, are expressly required to be entered on the public records of the county, and, as stated in that opinion, they are both facts of which all the world is bound to take notice, and as to which the county cannot be concluded by any recital in the bond. The Court will note that the language is most sweeping in its character, and that as to these facts the county can not be concluded by any recital in the bond. We call attention to the argument upon this point filed in the Lake county case already referred to.

It might be well to call attention to our theory of this case for the purpose of having the Court once and for all pass upon the mooted question. Our theory is, that where a constitutional limitation is placed upon any subordinate state authority that this limitation is absolute, and that such subordinate authority cannot by any method get around this restriction of the constitution. If the constitution

itself, in the language used, creates any subordinate tribunal and by a fair implication makes the decision of that subordinate tribunal binding, such decision of such tribunal would be a constitutional decision and would be a full compliance with the constitution itself. But if a mere legislative tribunal attempts to pass upon some such question in contravention of the express provision of the constitution, it is of no more weight or effect than as though it were any other mere voluntary body acting upon its own authority and without recognition from state or municipal authorities. That is to say, as this Court has expressly said in two or three decisions, facts of the kind in controversy here can not be concluded against the express language of the constitution by any tribunal established by the Legislature. The requirement of the constitution must be complied with, and can not be evaded by any legerdemain practiced by any persons claiming to act as county officers or to carry out provisions of statutes passed by the Legislature. These constitutional provisions were placed in that instrument by the whole people of a state after years of bitter experience both in the territory which was about to become a state, and in older states in which the framers of the constitu- had lived, and they were placed there for the purpose of avoiding difficulties that had been created by court decisions and by unwise legislation. It was evidently the intention of the framers of the constitution that these provisions should not be evaded. If now county authorities can, by any recital of something as a fact that is not a fact, evade these provisions, then it is futile to attempt to restrain any action upon the part of public officers. If this court, the final arbitrator of all questions of this kind, gives its sanction to a doctrine so revolu-

tionary in its character, then all attempts of the people to tie the hands of their servants, in the matter of incurring indebtedness, are all null and void. The contest might as well be given up, and every piece of paper issued by an agent, however unscrupulous and illegal he may be, must be paid if that agent happens to be representing the entire people of the community instead of some individual. The law has never yet carried the doctrine of agency to the extent of giving to the agent of an individual power to say that he possessed an authority which he did not. This unjust distinction has been left to public agents, whose principals are the people of an entire community. The distinction, in our judgment, ought never to have been made in the first instance; but, having once been made, and the people having attempted, by putting provisions in the most solemn documents known to the American citizen, to take it away, we think the intention of all the people ought to be made to prevail.

Fifth—The Court erred in holding the bonds from which the coupons were cut to be valid obligations of Gunnison county.

The arguments advanced under the four preceding heads necessarily establish this position. The Circuit Court held that the plaintiff was not entitled to recover, because the coupons were cut from bonds of Gunnison county that were void. We refer the Court to the language used by the Judge of the Circuit Court in his instructions to the jury. While the reasoning of the trial court is not part of the record, in a way, it is still such a clear and concise exposition of the law, that we commend it to this Court. His Honor, Judge Hallett, has tried so many of these cases, and he

is so thoroughly familiar with all the provisions of the law, both constitutional and statutory, existing in Colorado, that he speaks with more than ordinary authority upon it. It is also interesting to know that upon these points this Court has always sustained Judge Hallett's conclusions. It follows that if Judge Hallett was right in admitting in evidence the semi-annual statements and other evidence refered to, that the indebtedness represented by these bonds was illegal and void. The county clearly proved that the warrants which were surrendered and went into the bonds in controversy were illegal and void because issued after the limitation of indebtedness had been reached.

A county warrant, or any evidence of indebtedness, issued after the limit of indebtedeess had been reached by a county is *prima facie*, void, and when the defendant introduced in evidence the warrants which had been issued for these bonds, and it appeared that they were issued after the limit of indebtedness had been reached, it made out a *prima facie* case of want of power to issue the bonds. All of the authorities sustain this position.

The semi-annual statements of indebtedness contained a reference to a bond issue of $20,000. This alone would render all the warrants which went into these bonds illegal and void. But the conclusions of Judge Hallett, with the testimony before him, and with other testimony which the law will presume was in the record and in a sufficient amount to sustain his conclusions, is binding upon this Court, and upon the undisputed facts in the case there can be no room for controversy upon this position. If the semi-annual statements, the record of indebtedness and the warrants themselves

were proper evidence, we do not presume that counsel for the respondent will question that these bonds were illegal and void.

We, therefore, submit, for all of the reasons gone over, that the judgment of the Circut Court of Appeals should be reversed.

Respectfully submitted,

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